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No. 03-810

In The Supreme Court of the United States

DONALD O. PINKSTON,

Petitioner,

versus

OFFICE OF DISCIPLINARY COUNSEL OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Must the Louisiana Attorney Disciplinary rules and Procedures which cover the disbarring of attorneys comply with both procedural and substantive due process?

   1. Are the notice requirements of procedural due process infringed by application of permanent disbarment and foreclosure of employment and contractual relationship with lawyers' rules where permanent disbarment and employment preclusion were not a penalty when Petitioner wrongfully violated "the most fundamental duty of an officer of the court" by making false statements to a judge and concealing evidence from the court which should have been revealed and injuring clients through neglect of legal matters, failure to account and to return unearned legal fees?

   2. Does "fundamental fairness" and "fair warning" require that the punishment of permanent disbarment and employment preclusion be known at the time of wrongful conduct?

II. May Louisiana's new Supreme Court Rules, providing for a penalty of permanent disbarment and employment preclusion, be applied retroactively without violating the constitutional prohibition against state *ex post facto* laws?

PARTIES

The parties in this Court and the court below are as follows:

Petitioner: Donald O. Pinkston was the respondent before the Louisiana Attorney Disciplinary Board and in the Supreme Court of Louisiana.

Respondent: The Office of the Disciplinary Counsel prosecuted the petitioner before the Louisiana Attorney Disciplinary Board and in the Supreme Court of Louisiana.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This court should deny the former lawyer Pinkston's petition for a writ of certiorari. The Louisiana Supreme Court permanently disbarred Mr. Pinkston for a variety of professional misconduct, including subverting the judicial process by manipulating a client's criminal sentencing, neglecting legal matters, failing to promptly provide accountings, and failing to return unearned fees to his clients.

Pinkston's petition does not assert that the Louisiana Supreme Court's decision conflicts with any decisions of this court, of a federal court of appeals, or of the highest court of another state. This case does not raise any federal issues of broad applicability. In fact, most of the former lawyers' claims effect only a small group of Louisiana lawyers who committed significant violations of Louisiana's attorney disciplinary rules ("disciplinary rules") in a narrow time frame.

JURISDICTION

The respondent agrees that this Court has jurisdiction under 28 U.S.C. §1257 to review the 20 May 2003 ruling of the Supreme Court of Louisiana and that court's 5 November 2003 denial of Pinkston's application for rehearing.

STATEMENT OF THE CASE

A. Parties.

The petitioner ("former lawyer") is Donald O. Pinkston.

The respondent is the Office of the Disciplinary Counsel of the Louisiana Attorney Disciplinary Board.

B. Facts and Procedural History.

The statement of this case and its procedural history are fully and clearly set out in the Louisiana Supreme Court's 20 May 2003 opinion reproduced at Petitioner's Appendix D.

REASONS FOR DENYING THE WRIT

I. DUE PROCESS.

Former lawyer Pinkston's due process challenges to his disbarment do not merit this court's attention. The Louisiana Supreme Court's decision does not conflict with any decision of this Court, of a federal court of appeals, or of the highest court of another State.[1] His due process challenges do not present important questions of federal law.[2] Instead, his claims lack arguable merit and ask this court to overturn the Louisiana Supreme Court's interpretation of Louisiana law.

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[1] Supreme Court Rule 10(b) & (c).

[2] Supreme Court Rule 10(c).

A. Retroactive application of the permanent disbarment rule to his conduct.

Former lawyer Pinkston asserts that the Louisiana Supreme Court violated his 14th Amendment due process rights by applying a "new" permanent disbarment rule to him. He asserts that he had no notice at the time he committed his misconduct that he might face permanent disbarment.

First, Pinkston's argument lacks merit because permanent disbarment is not a "new" possible sanction. The possible sanctions available to the Louisiana Supreme Court in attorney disciplinary cases are a matter of Louisiana law. This court is bound to accept the interpretation of Louisiana law by the Supreme Court of Louisiana (the highest court of the State).[3] The Louisiana Supreme Court has expressly held that permanent disbarment is not a "new" sanction:[4]

> Given this court's absolute discretion over readmission, it is beyond dispute that this court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis.
>
> Thus, it is clear the amendments to Supreme Court Rule XIX, § 10(A) and § 24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a

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[3] *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976).

[4] App. A, p. 12a; *In re Laudumiey*, 2003-0234, p. 10 (La. 6/27/03), 849 So.2d 515, 522, *cert. denied*, ___ U.S. ___, 124 S.Ct. ___, ___ L.Ed.2d ___ (12/1/2003).

> new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed.

The Louisiana Supreme Court repeated that holding in its denial of Pinkston's petition for rehearing:[5]

> As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist; rather, it is simply a procedural change to the rule which recognizes a power the court has always possessed.

Second, Pinkston's citation to *In re: Ruffalo*[6] is misplaced. *Ruffalo* held that an attorney is entitled to notice of the *charges* against him prior to the disciplinary hearing.[7] Pinkston does not claim that he was not provided notice of the specific charges of misconduct brought against him. Instead, he alleges that he was entitled to specific notice of the potential *penalties* he faced.

Ignorance of the law is no excuse.[8] If ignorance of the law generally is no defense to a criminal charge,[9] ignorance of the potential penalty in an attorney disciplinary case is even less of an excuse. The Louisiana Supreme

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[5] App. A, p. 2a; *In re Pinkston*, 2002-3251 (La. 9/5/03) (denial of rehearing), 852 So.2d 966, 976.

[6] 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

[7] 390 U.S. at 550, 88 S.Ct. at 1226.

[8] *Bryan v. U.S.*, 524 U.S. 184, 195, 118 S.Ct. 1939, 1947, 141 L.Ed.2d 197 (1998).

[9] *Ratzlaf v. U.S.*, 510 U.S. 135, 149, 114 S.Ct. 655, 663, 126 L.Ed.2d 615 (1994).

Court's new permanent disbarment procedures became effective on 1 August 2001.[10] This was 8 months prior to the 28 March 2002 Disciplinary Board hearing concerning the charges against Pinkston[11] and even longer before the Louisiana Supreme Court oral argument. Accordingly, Pinkston had adequate notice during the disciplinary proceedings of the potential sanctions he faced.

B. Fair warning.

Next, Pinkston alleges that permanent disbarment violated his 14th Amendment due process rights because he did not have "fair warning" at the time he committed his misconduct that he could be permanently disbarred.

As with his retroactivity argument, this argument is foreclosed by the fact that permanent disbarment is not "a new sanction which did not previously exist"[12] but, instead, is a power the Louisiana Supreme Court "has always possessed".[13]

Additionally, Pinkston admits that at the time he committed his misconduct, Louisiana's rules expressly provided that he could be disbarred with only a hope of discretionary readmission after 5 years. It is somewhat disingenuous for him to argue that had he only been aware that he could be permanently disbarred without the hope of discretionary readmission, he would not have

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[10] *In re: Laudumiey*, p. 7, 849 So.2d at 520.

[11] Opposition, App. A, p. 3a.

[12] Petition, App. A, p. 2a.

[13] Petition, App. A, p. 2a.

subverted the judicial process by manipulating his client-Small's criminal sentencing or engaged in any of the other professional misconduct involved in this case.

Accordingly, this issue does not merit this court's attention.

II. FORMER LAWYER PINKSTON'S EX POST FACTO CHALLENGE DOES NOT MERIT THIS COURT'S ATTENTION.

Former lawyer Pinkston's *ex post facto* challenge to his disbarment does not merit this court's attention. The Louisiana Supreme Court's decision does not conflict with any decision of this Court, of a federal court of appeals, or of the highest court of another State.[14] His *ex post facto* challenge is not an important question of federal law[15] because it does not have broad applicability. Rather, his challenge addresses only the severity of his sanction: permanent disbarment as opposed to disbarment with the ability to apply for discretionary readmission after 5 years. Pinkston's *ex post facto* claim applies only to the small number of Louisiana lawyers who committed serious misconduct prior to 1 August 2001. Further, his challenge lacks arguable merit.

First, the former lawyer correctly notes that the *Ex Post Facto* Clause[16] prohibits a state from enacting a "law that aggravates a crime, or makes it greater than it was,

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[14] Supreme Court Rule 10(b) & (c).

[15] Supreme Court Rule 10(c).

[16] U.S. Constitution, Art. I, §10, cl. 1.

when committed".[17] However, he fails to recognize that this rule does not apply to his case because permanent disbarment is not a "new" sanction.

As stated above, the possible sanctions available to the Louisiana Supreme Court in attorney disciplinary cases is a matter of Louisiana law and this court is bound to accept the Supreme Court of Louisiana's interpretation of Louisiana law.[18] In rejecting Pinkston's *ex post facto* argument, the Louisiana Supreme Court expressly held that permanent disbarment is not a "new" sanction:[19]

> As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist; rather, it is simply a procedural change to the rule which recognizes a power the court has always possessed. *See In re: Laudumiey and Mann*, 03-0234 (La. 6/27/03), at p. 10, ___ So.2d ___ ("[t]hus, it is clear the amendments to Supreme Court Rule XIX, § 10(A) and § 24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed").

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[17] *Stogner v. California*, ___ U.S. ___, ___, 123 S.Ct. 2446, 2450, 156 L.Ed.2d 544 (2003), citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798).

[18] *Hortonville*, 426 U.S. at 488, 96 S.Ct. at 2312.

[19] App. A, p. 2a; *In re Pinkston*, p. 2 (on rehearing), 852 So.2d at 976.

Contrary to Pinkston's claim that permanent disbarment is a "new" potential punishment, the Supreme Court of Louisiana has always had that power:[20]

> Given this court's absolute discretion over readmission, it is beyond dispute that this court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis.

Pinkston's *ex post facto* argument asks this court to reverse the Louisiana Supreme Court's interpretation of Louisiana law that held the court "has always possessed" the power to permanently disbar a Louisiana lawyer. To do so would require this court to reverse its *Hortonville* decision, to displace a state's highest court as the ultimate interpreter of state law, and instead to install this court as the ultimate interpreter of state law. The former lawyer cites no authority for such a tectonic shift in bedrock federalism principles.

Second, Pinkston's "fair warning" claim is misplaced. This court held in *Rogers v. Tennessee*[21] that the "fair warning" concept is rooted in the Due Process Clause, not the *Ex Post Facto* Clause.

Third, the record contradicts Pinkston's "fair warning" claim. He apparently concedes that the Louisiana Supreme Court has always had the power to create the sanction of permanent disbarment, but argues that the

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[20] *In re: Laudumiey*, p. 10, 849 So.2d at 522.

[21] 532 U.S. 451, 459, 121 S.Ct. 1693, 1699, 149 L.Ed.2d 697 (2001).

court did not exercise that power until after his misconduct occurred:[22]

> The fact that the Louisiana Supreme Court had the power [to create the sanction of permanent disbarment] does not alter the *ex post facto* issue. A legislature has the power to increase the punishment for a crime at any time. The issue is retroactivity to the offense.

But the record reflects that permanent disbarment was not a newly created sanction:[23]

> As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist;

The issue is not, as Pinkston asserts, that the Supreme Court of Louisiana merely possessed the power to create that new sanction. The court found, as a matter of Louisiana law, that permanent disbarment was not a new sanction at all. As noted above, this court is bound to accept the interpretation of Louisiana law by the Supreme Court of Louisiana.[24]

Fourth, the former lawyer's argument is somewhat incredible. He asserts that the threat of permanent disbarment somehow would have deterred him from his serious legal misconduct – including his intentional corruption of the judicial process in the *Small* sentencing

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[22] Petition, pp. 13-14.

[23] App. A, p. 2a; *In re Pinkston*, p. 2 (on rehearing), 852 So.2d at 976.

[24] *Hortonville*, 426 U.S. at 488, 96 S.Ct. at 2312.

matter – when the threat of disbarment for at least 5 years with only a hope of discretionary readmission failed to deter him.

Accordingly, former lawyer Pinkston fails to show that this court should exercise its discretion and hear his *ex post facto* challenge to his disbarment.

III. FORMER LAWYER PINKSTON'S CHALLENGES TO THE SPECIFIC SANCTION OF PERMANENT DISBARMENT ARE NOT RIPE.

The majority of former lawyer Pinkston's claims relate to the sanction of permanent disbarment. He admits that the Louisiana Supreme Court could have disbarred him. However, he asserts that he should have the opportunity to apply for readmission after 5 years. These claims are not ripe for review.

Ripeness "is peculiarly a question of timing".[25] No one knows what the future may bring. The former lawyer's claim will be ripe only if he seeks readmission 5 years from now, if he is otherwise eligible for readmission, and if the Louisiana Supreme Court denies his application based on the permanent disbarment rule. At that time there will be a sharply focused case and controversy based upon an actual implementation of his permanent disbarment.[26]

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[25] *Anderson v. Green*, 513 U.S. 557, 559, 115 S.Ct. 1059, 1060, 130 L.Ed.2d 1050 (1995).

[26] *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 60, 113 S.Ct. 2485, 2497, 125 L.Ed.2d 38 (1993) (an alien's challenges to new INS regulations are not ripe until the alien's application for a change in status is denied based upon the new regulations).

As a result, former lawyer Pinkston's claims concerning his sanction are not yet ripe at this time.

IV. FORMER LAWYER PINKSTON DID NOT RAISE HIS "EMPLOYMENT PRECLUSION" CLAIMS IN THE LOUISIANA SUPREME COURT.

In Pinkston's first question presented, he challenges Louisiana's employment preclusion rule on due process grounds. In his second question presented, former lawyer Pinkston challenges that rule on *ex post facto* grounds. This court should not grant a writ on the employment preclusion issue.

First, Pinkston's writ application does not develop his *ex post facto* issue. He mentions employment preclusion in the questions presented and again (in passing) in the introductory section of his "Reasons for Granting the Writ".[27] While Pinkston mentions employment preclusion in his discussion of the due process issues,[28] he does not mention the employment preclusion rule in his discussion of the *ex post facto* issues.[29] That discussion is exclusively devoted to his *ex post facto* challenge to his permanent disbarment.

Second, this court will not reach issues that the petitioner did not raise or brief below.[30] A petitioner

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[27] Petition, p. 6.

[28] Petition, pp. 8-13.

[29] Petition, pp. 13-17.

[30] *TRW Inc. v. Andrews*, 534 U.S. 19, 34, 122 S.Ct. 441, 451, 151 L.Ed.2d 339 (2001).

seeking review of a state court judgment must identify in his writ application where in the state court proceedings he raised the federal issues presented to this court for review.[31]

Pinkston's writ application does not show where he raised his employment preclusion challenges in the Louisiana Supreme Court. He does not raise the issues in his Petition for Rehearing in the Louisiana Supreme Court.[32] Pinkston did not submit his original Louisiana Supreme Court brief in his Appendix to his writ application, so this court cannot determine if he raised the issues in that document. The Louisiana Supreme Court did not address the employment preclusion issues in either its original decision or in its denial of Pinkston's application for rehearing. Accordingly, Pinkston has not properly preserved these issues for review.

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[31] Supreme Court Rule 14.1(g)(i).

[32] Petition, Appendix B, p. 3a.

CONCLUSION

This Court should deny Pinkston's petition for a writ of certiorari to the Supreme Court of Louisiana.

Respectfully submitted,

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APPENDIX A

PINKSTON, DONALD O.
99-DB-029, 00-DB-073 (12/30/2002)

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: DONALD O. PINKSTON
NUMBERS 99-DB-029 AND 00-DB-073
RECOMMENDATION TO THE LOUISIANA SUPREME COURT

This is a disciplinary proceeding based upon the filing of formal charges against the Respondent, Donald O. Pinkston, by the Office of Disciplinary Counsel ("ODC"). For the reasons stated below, the Disciplinary Board recommends that the Respondent be disbarred from the practice of law.

PROCEDURAL HISTORY

Case Number 99-DB-029

Formal charges, consisting of one count, were filed against the Respondent, Donald O. Pinkston, on April 21, 1999. These charges allege that the Respondent violated Rules of Professional Conduct 1.2 (counseling or encouraging a client to engage in conduct that the lawyer knows is criminal or fraudulent); 3.3(a)(1) (knowingly making false statements of material fact or law to a tribunal); 3.3(a)(2) (knowingly failing to disclose that which a lawyer is required by law to reveal); 3.3(a)(4) (knowingly offering evidence that the lawyer knows to be false); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(a) (violating or attempting to

violate the Rules of Professional Conduct); 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). The Respondent filed an answer to the formal charges on June 2, 1999, denying that his conduct constituted violations of the Rules of Professional Conduct as charged.

ODC filed its Pre-Hearing Memorandum on December 4, 2000. The Respondent filed his Pre-Hearing Memorandum on December 11, 2000. The hearing in this matter was held before Hearing Committee Number Twenty-Four on December 14, 2000. ODC filed its Post-Hearing Memorandum on January 24, 2001, and the Respondent filed his Post-Hearing Memorandum on April 6, 2001. The hearing committee issued its report on May 9, 2001, recommending that the Respondent be disbarred from the practice of law.

Case Number 00-DB-073

Formal charges, consisting of seven counts, were filed against the Respondent on June 12, 2000. These charges allege that the Respondent violated Rules of Professional Conduct 1.3 (failure to act with diligence), 1.4 (lack of communication), 1.5 (failure to properly handle a fee dispute by promptly returning unearned portion of fee), 1.15 (failure to provide an accounting), 1.16(d) (failure to return advance payment of fee that has not been earned), 5.5 (unauthorized practice of law), 8.1(a) (knowingly make a false statement of material fact in a disciplinary matter), 8.4 (a) (violating the Rules of Professional Conduct), 8.4 (c) (engaging in conduct involving dishonest, fraud, deceit or misrepresentation) and 8.4(d) (engaging in conduct that is

prejudicial to the administration of justice). The Respondent answered these charges on July 5, 2000, denying the allegations.

ODC filed its Pre-Hearing Memorandum in this matter on September 6, 2000. The Respondent did not file a Pre-Hearing Memorandum. The hearing before Hearing Committee Number Twenty-Four was held on September 14, 2000. ODC filed its Post-Hearing Memorandum on November 30, 2000. The Respondent also filed his Post-Hearing Memorandum on November 30, 2000. The hearing committee issued its report on March 8, 2001, recommending that the Respondent be suspended from the practice of law for thirty months and that he be required to file a petition for reinstatement. The committee also recommended that the Respondent be required to pay restitution to several individuals and that he be assessed with the costs of the disciplinary proceedings.

After several continuances, oral argument for case number 99-DB-029 and case number 00-DB-073 was held before Panel C of the Disciplinary Board on March 28, 2002.[1] Chief Disciplinary Counsel Charles B. Plattsmier appeared on behalf of ODC. The Respondent and his counsel, Herbert V. Larson, Jr., also appeared.

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[1] Although neither party filed a motion to consolidate these cases, in the interest of judicial economy, the Board set the cases for oral argument on the same date and issues the instant recommendation addressing both matters.

THE FORMAL CHARGES

The formal charges in case number 99-DB-029 read, in pertinent part, as follows:

COUNT I

Donald O. Pinkston undertook the representation of Dwayne Small in connection with post-conviction relief efforts. Dwayne Small is the Respondent's stepson, the child of his wife from a prior union. Defendant Small pled guilty to manslaughter and was sentenced to 21 years in prison. Five years later the Respondent was engaged by Dwayne Small to assist him in getting his sentence "corrected." A motion to correct the sentence was filed and presented to then Judge Ad Hoc Ike Spears on June 15, 1996. Based upon certain representations made to the Court by Pinkston, Small's sentence was reduced to 12 years at hard labor. The State objected to the sentence reduction and filed a Motion for Reconsideration. Judge Spears eventually granted the State's Motion for Reconsideration and reinstated the original sentence to 21 years at hard labor. Neither the State nor the defendant sought supervisory relief. The defendant did, however, seek to have the matter brought before Section C (previously Ad Hoc Judge Ike Spears' division) and by minute entry Judge Hunter determined that the matter was satisfied and the case was closed.

For reasons which are unclear but which may have involved manipulation of the Court's docket by the clerk's minute clerk, the Dwayne Small matter was placed on the March 21, 1997 docket of Judge Julian Parker, Division G. The Respondent appeared in Court on that day and represented to

Judge Parker that Judge Hunter had recused herself when in fact Judge Hunter had never recused herself. The Court accepted Pinkston's oral representation to the Court and therefore entertained Donald Pinkston's Motion to Correct an Excessive Sentence indicating that Judge Ike Spears had previously misspoken in June of 1996 when he reduced the sentence to 12 years rather than to 9 years as had been originally contemplated. The Respondent specifically failed to advise the Court that Judge Spears had rescinded his earlier order and had reinstated the 21 year jail term.

The Court accepted Pinkston's word and directed that an amended minute entry be sent to the Department of Corrections whereby a sentence of nine years was imposed resulting in the immediate release from custody of the defendant, Dwayne Small.

Thereafter, upon being alerted by the D.A.'s Office that they objected to this entry of sentence, Judge Parker investigated the matter and determined that the full facts had not been explained by Pinkston and that certain misrepresentations had been made to the Court. Judge Parker went on to note that the October 14, 1996 entry of Judge Spears reversing his earlier reduction of sentence and reinstating the 21 years hard labor sentence was missing from the record. The error was detected by the Department of Corrections and the District Attorney's Office and the defendant, Dwayne Small, was then reapprehended, the record corrected, and he was resentenced to serve his 21 years in jail. The minute clerk working for Judge Julian Parker at the time, Delwin Davis, has since been discharged

by Judge Parker. The respondent's conduct constitutes counseling or encouraging a client to engage in conduct that the lawyer knows is criminal or fraudulent in violation of Rule 1.2(c); knowingly making false statements of material fact or law to a tribunal in violation of Rule 3.3(a)(1); knowingly failing to disclose that which he is required by law to reveal in violation of 3.3(a)(2); knowingly offering evidence that the lawyer knows to be false in violation of Rule 3.3(a)(4); engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c); violating or attempting to violate the Rules of Professional Conduct in violation of Rule 8.4(a); and engaging in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).

The formal charges in case number 00-DB-073 read, in pertinent part, as follows:

COUNT I

Respondent was paid $3,500.00 by Irene McDowell to assist in Kevin McDonald's criminal case. Respondent did little or no work and failed to account for any earned portion and has failed to refund any of the unearned portion in violation of Rules 1.3, 1.4,1.5,1.15,1.16(d) and 8.4(a)(c) of the Rules of Professional Conduct.

COUNT II

Respondent was paid by Ammie Isaac to handle a criminal matter for Emanuel Isaac. Respondent failed to complete the work, failed to account for any earned portion of the fee and failed to return the unearned portion of the fee, in violation of Rules 1.3 and 1.16 of the Rules of Professional Conduct.

COUNT III

Respondent was paid by David Singleton to handle a criminal matter. Respondent failed to complete the work, failed to account for any earned portion of the fee and failed to return the unearned portion of the fee, in violation of Rules 1.3, 1.4 and 1.16 of the Rules of Professional Conduct.

COUNT IV

Respondent agreed to participate in the Louisiana State Bar Association Alternative Dispute Resolution Program. The arbitrator awarded Respondent's client $3,000.00, which reflected the unearned portion of Respondent's fees. Respondent has failed to refund this amount and Respondent is in violation of Rules 8.1(a) [and] 8.4(a)(c)(d) of the Rules of Professional Conduct.

COUNT V

Respondent was paid by Charles Martin to handle a criminal matter in Mississippi. Respondent is not licensed to practice law in Mississippi and did not file the necessary paperwork to appear pro hac vice in Mississippi and was therefore practicing in a state where he is not licensed in violation of Rule 5.5 of the Rules of Professional Conduct.

COUNT VI

Respondent was paid by Hilda Jones to handle a criminal matter for Keith Jones. Upon suspension from the practice of law, Respondent failed to account for any earned portion of the fee and to promptly refund the unearned fee to Mrs. Jones in violation of Rule 1.16 of the Rules of Professional Conduct.

COUNT VII

Respondent was paid $2,300.00 by Agnes Motton and Zina Nunnery to handle a post conviction matter for Frank Motton. Respondent did not complete the work and failed to account for any earned portion and refused to refund the unearned portion in violation of Rules 1.3, 1.4, 1.5 [and] 1.16 of the Rules of Professional Conduct.

THE HEARING COMMITTEES' REPORTS

Case Number 99-DB-029

The hearing committee made the following factual findings in this matter:

"Dwayne Small was a defendant in Orleans Parish Criminal District Court, charged with the commission of a homicide. It was on the docket of Judge Jerome Winsberg, Section "C." As part of a plea bargain, the District Attorney's Office reduced the charge to manslaughter in exchange for a guilty plea and a sentence of 21 years. Small was represented by Ernest Caulfield. The plea was accepted, a 21-year sentence was imposed by Judge Winsberg, and Small began serving his sentence in or about 1992.

Dwayne Small is the stepson of the Respondent. In 1995, Respondent enrolled as Counsel of record for Mr. Small and filed, on Small's behalf, a "Motion to Correct Excessive Sentence," which was scheduled for hearing in February of 1996. Before the motion was heard, Judge Winsberg retired, effective January 1996, and the Louisiana Supreme Court appointed Ike Spears to sit as Judge Pro Tempore in Section "C" pending a new election.

At the February 1996 hearing, Respondent argued that the "Sentencing Guidelines Grid" required a shorter sentence for Small's crime. Judge Spears reset the matter for March 1996, and in the interim the District Attorney's Office filed memorandum in opposition to the Motion to Reduce Excessive Sentence. In his testimony before the Committee, Judge Spears acknowledged that he did not believe the Respondent's arguments for a sentence reduction had sufficient merit to withstand appellate review, but he was willing to entertain the motion because Respondent assured him that the District Attorney, Harry Connick, or someone within Mr. Connick's office, had agreed not to oppose the motion. The Assistant District Attorney assigned to the case, Maurice Landrieu, who as testified before the Committee, could not confirm such an agreement. Judge Spears postponed the hearing of the motion several times to afford Respondent an opportunity to confirm the purported agreement not to oppose the motion, but Respondent was unable to do so.

On June 25, 1996, Judge Spears ruled on the motion and reduced Dwayne Small's sentence from 21 to 12 years, but stayed the effect of the order to enable the State to file writs. On July 2, 1996, Mr. Landrieu filed a motion seeing reconsideration of the sentence reduction. Judge Spears kept the stay in place and again continued hearings of the State's motion to permit Respondent an opportunity to confirm his purported agreement with the District Attorney's Office. Finally, on October 4, 1996, with Respondent present, Judge Spears granted the State's motion to reconsider and reinstated Dwayne Small's original 21 year sentence. At the request of the Respondent,

Judge Spears scheduled a status conference on the matter for November 1996.

Before that status conference, Sharon Hunter was elected to fill the vacancy in Section "C," and the matter passed to her. On November 15, 1996, she held a status conference, and the docket reflects that, "the status hearing considered held and satisfied," which in her deposition testimony the Judge said meant "nothing else was to be had." (Hunter Deposition, pg. 10). Small remained in prison.

For unexplained reasons, Dwayne Small's case appeared on the docket of Judge Julian Parker, Section "G", on March 21, 1997. On that day, Respondent represented to Court that "I have had an opportunity to discuss the matter with the Assistant District Attorney and pursuant to the conference that we held, I understand that a corrected minute entry needs to be sent to the Department of Corrections in the matter. We request the court to order a corrected minute entry be entered." (ODC Exhibit 8). Respondent represented to the court that Judge Spears had imposed a 12 year sentence on Dwayne Small, but that an error had been made and that the actual sentence should have been 9 years. Judge Parker reduced Small's sentence to 9 years. Small was released from prison.

Citizens in the community learned of Small's release and raised their concerns with the District Attorney's Office. Maurice Landrieu asked Judge Parker to convene a hearing to review the circumstances of the release. A hearing was held on October 8, 1997, and Judge Parker asked Respondent how and why the case was transferred to his Court from Section "C." Respondent replied, "It

was remanded to Section G by Judge Hunter. She recused herself." (ODC Exhibit 11). In a subsequent hearing on the same subject, how the matter got into Section "G," Respondent answered, "Your Honor, I have no idea. I have no connections with this building. I have no connections with Judge Hunter. I have no connections with the court. All I know is that the case was on the docket, I received a subpoena, I showed up." (ODC Exhibit 13). In a subsequent hearing before Judge Parker on this same issue, Mr. Landrieu informed the court that Judge Spears had reversed his reduction of the sentence and restored the original sentence of 21 years. Mr. Pinkston responded, "That's not true." (ODC Exhibit 19).

Judge Parker revoked his reduction of Small's sentence, and Respondent applied for writs to the Fourth Circuit Court of Appeal. That court requested a Per Curiam from Judge Parker explaining the situation, and in that statement the Judge declared that his court had been "misled" by Respondent as to what sentence Judge Spears had actually imposed on Small, and by Respondent's representation that Judge Hunter had recused herself. (ODC Exhibit 21). In her deposition, Judge Hunter testified that she had not recused herself from the Dwayne Small case.

Each of the Assistant District Attorneys present in Judge Parker's court on the day that Respondent first brought the Dwayne Small matter before the Judge state that Respondent had no conference with them on the matter."

In a subsequent section of its report, the hearing committee made the additional findings of fact:

1. Judge Ike Spears, sitting Pro Tempore in Section "C," reversed his earlier reduction of sentence of Dwayne Small and, on October 4, 1996, reinstated Mr. Small's 21-year sentence.

2. Judge Sharon Hunter, Judge in Section "C," did not recuse herself from consideration of Dwayne Small's case. The matter was marked closed on the docket of Section "C." Judge Hunter did not allot the case to Section "G."

3. Respondent misrepresented to Judge Parker (a) that Judge Sharon Hunter had recused herself when she had not; (b) that Judge Spears had reduced Dwayne Small's sentence to 12 years when in fact the Court had reinstated the 21 year sentence; and (c) that the minute entry by Judge Spears was erroneous and should be corrected to further reduce Dwayne Small's sentence to 9 years when there is no indication that Judge Spears ever intended to reduce Small's sentence to 9 years (and Mr. Spears testified that he never reduced the sentence to 9 years). Hearing Tr., pp. 86-91).

1. As a result of the misrepresentations by Respondent to the Court, Judge Parker signed a "corrected" minute entry that resulted in the temporary release of Dwayne Small from prison.

2. The testimony of Maurice Landrieu, Ike Spears, Judge Sharon K. Hunter, and Judge Julian Parker is credible with respect to the foregoing.

3. While no direct evidence establishes how the Dwayne Small case was moved onto Judge Parker's docket, both Judge Parker and Judge Hunter stated that they did not request or consent to the transfer. (ODC Exhibit 21; Hunter Deposition, page 13). If Respondent did not improperly cause the transfer, he nevertheless took advantage of it.

4. There was conflicting testimony as to whether an assistant district attorney was present when Judge Parker, on March 21, 1997, ordered Small's sentence reduced, but this issue was not material to the Committee's findings or recommendations.

The hearing committee found that ODC had proven by clear and convincing evidence violations of Rules of Professional Conduct 3.3(a)(1), 3.3(a)(2), 3.3(a)(4), 8.4(a), 8.4(c) and 8.4(d). The committee did not find a violation of Rule 1.2(c). The committee determined that the primary aggravating factors were Respondent's prior discipline[2] and his substantial experience in the practice of law. In mitigation, the committee found that the Respondent had cooperated with the disciplinary process. The committee recommended that the Respondent be disbarred, relying

[2] Respondent's prior discipline includes a previous two-year suspension for failure to maintain clients' funds in trust and failure to promptly pay medical providers See *In re Pinkston*, 98-1926 (12/11/98); 728 So.2d 381. Respondent has never been reinstated since the completion of that suspension. Respondent also received a reprimand in 1997 for misleading clients, failure to return an unearned fee, and commingling funds, and four admonitions between 1994 and 1995 for failure to cooperate by not filing written answers to complaints.

on Standards 6.11 and 7.1 of the ABA Standards for Imposing Lawyer Sanctions. The committee also noted that in the Respondent's pre-hearing memorandum he stipulated that "[t]he appropriate sanction for both charges brought by the Office of Disciplinary Counsel is disbarment, if the charges are proven by clear and convincing evidence."

Case Number 00-DB-073

The hearing committee made the following factual determinations and findings of rule violations in connection with this matter:

1. Count I: The committee found that while the Respondent may not have explicitly promised a specific result to Mr. McDonald, he reasonably believed that, for $3,500, Respondent would successfully obtain a bond hearing or favorable sentencing. The Respondent failed to do so. The committee found that the Respondent violated Rule 1.5(f)(6). The committee found no violations of Rules 1.3, 1.4, 1.15, 1.16(d) or 8.4(a)(c).

2. Count II: The committee found that the Respondent failed to diligently pursue Mr. Isaac's appeal and failed to communicate adequately with his client or Ms. Isaac about the status of the case. The committee found that the Respondent appeared in court on Mr. Isaac's behalf on at least two occasions, and that he did ultimately file an appeal brief on his client's behalf. The committee found that Respondent violated Rule 1.3, and though he was not formally charged with the

following, Rules 1.4 and 1.5(f)(6). The committee found no violation of Rule 1.16.

3. Count III: The committee determined that the evidence showed that the Respondent spoke on one occasion to the trial judge about a reduction of Mr. Singleton's sentence and spoke several times to Mr. Singleton's wife about the issue. He also spoke with Mr. Singleton several times about the matter and obtained Mr. Singleton's medical records in order to make a case for a sentence reduction or a transfer for his client. The committee found that the Respondent did not violate Rules 1.3, 1.4 and 1.16(d).

4. Count IV: The committee determined that the Respondent agreed to participate in the LSBA's Alternative [Fee] Dispute Resolution Program and was ordered to pay $3,000 to a former client, Ms. Alston. He paid $1,000 of this amount, but failed to pay the rest of the amount due. The committee found that the Respondent violated Rules 8.4(a) and 8.4(d) in connection with this count. Violations of Rules 8.1(a) and 8.4(c) were not found.

5. Count V: The committee found that the Respondent took the steps necessary to file the required documents with the Mississippi Circuit Court. Respondent appeared in court on two occasions, but his Mississippi co-counsel attended the hearing in which the client, Mr. Martin, entered a guilty plea to the charge of murder. Mr. Martin filed complaints with the Mississippi and Louisiana disciplinary authorities, alleging that the Respondent was not authorized to practice law in Mississippi. The Mississippi Bar Association, hearing the

same charges, found "no conduct of said attorney which would warrant any action under the disciplinary rules governing lawyers practicing in this state." The committee found that the Respondent did not violate Rules 5.5 or Rule 8.1(a). (A violation of Rule 8.1(a) was alleged in ODC's post-hearing memorandum).

6. Count VI: The committee found that the Respondent accepted payment from Ms. Jones on February 16, 1999 to handle a criminal matter for her son. He was subsequently suspended and failed to refund the $1,000 to Ms. Jones until August of 1999, after a disciplinary complaint was filed. The committee found that the Respondent violated Rule 1.16(d).

7. Count VII: The committee determined that the Respondent was retained in 1995 to represent Frank Motton. He was paid $2,300 by Agnes Motton and Zina Nunnery for his services. Over the next three years, he filed three writs of habeas corpus to have Mr. Motton brought to the district court for a hearing on Motton's application, but each time the matter was continued. Respondent admits that he did not earn the entirety of his fee. The committee also noted that "there is no credible evidence that the Respondent did communicate fully with its clients." The committee found that the Respondent violated Rules 1.3 and 1.5(f)(6). The committee did not find violations of Rules 1.4 and 1.16(d), however.

The committee relied upon Standards 4.12 and 4.42 of the ABA Standards for Imposing Lawyer Sanctions and

determined that the appropriate baseline sanction was suspension. The committee found the following aggravating factors to be present: prior discipline and pattern of misconduct. The sole mitigating factor found by the committee was cooperative attitude towards disciplinary proceedings. The committee also found that the Respondent owed restitution to Mr. McDonald, Ms. Isaac, Ms. Alston, Ms. Motton and Ms. Nunnery.

ANALYSIS

I. Standard of Review

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges. . . . and prepare and forward to the court its own findings, if any, and recommendations."

Inasmuch as the Board is serving in an appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue*, 365 So. 2d 1330 (La.1978); *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). The Board conducts a de novo review of the hearing committee's application of the Rules of Professional Conduct. *In re Hill*, 90-DB-004.

Case Number 99-DB-029

A review of the record in this matter reveals that the committee's findings of fact are not manifestly erroneous,

and the Board adopts the committee's findings. Further, the committee's application of the Rules of Professional Conduct is proper.

Case Number 00-DB-073

In this matter, the committee's findings of fact are not manifestly erroneous, and the Board adopts the committee's findings. The Board further notes as to Counts I and IV that at the oral argument held in this matter, the Respondent indicated that he had refunded 50% (or $1,750) of the fee paid to him by Mr. McDonald and the entire $3,000 which the LSBA Alternative Dispute Resolution Program had awarded to Ms. Alston. As to the committee's application of the Rules of Professional Conduct, the Board finds that the following errors are present:

1. Count I: A violation of Rule 8.4(a) (violating the Rules of Professional Conduct) should also be added to the violations present, although this violation adds little, if anything, to the sanction imposed.

2. Count II: The violations of Rules 1.4 and 1.5(f)(6) were not charged and will not be adopted by the Board. See *LSBA v. Keys*, 567 So.2d 588 (La. 1990) citing *LSBA v. McGovern*, 481 So.2d 574 (La. 1986) (due process prohibits sanctioning an attorney for unrelated misconduct revealed by the evidence in the disciplinary proceeding when the attorney has not been notified that the uncharged violations would be considered as disciplinary offenses or that he should be prepared to present a defense as to that misconduct). Along with a violation of Rule 1.3, a violation of Rule 1.16(d) is also present. The

Respondent did not properly terminate his representation with Mr. Isaac upon Respondent's suspension from the practice of law, which would include giving reasonable notice to the client, surrendering papers and property to which the client is entitled and refunding any advance payment of unearned fees.

3. Count VII: The hearing committee erred in failing to find a violation of Rule 1.4. Although the committee noted that "there is no credible evidence that the Respondent did communicate fully with its clients," it failed to find this rule violation. Mrs. Agnes Motton testified at the hearing that during the Respondent's representation of Frank Motton, the Respondent never wrote to her or called her to inform her of what was happening with the case. He never called her to make an appointment to come in to see him. She testified that she called him on one occasion to ask him the status of Frank's case. Respondent told her to bring some money with her, so she took a $100.00 money order and met with him. At that time, he told her that "Frank had a good case, and it was looking good, but at the meantime it was not active with the court." She did not get a letter from the Respondent concerning his suspension, and to her knowledge, her son did not ever receive a letter about Respondent's suspension. Hearing Tr., pp. 179-80; 188.

The Board finds that the hearing committee's application of the Rules of Professional Conduct in Counts III through VI are correct. The Board also finds that the aggravating factor of substantial experience in the practice

of law should be added to the aggravating factors cited by the committee.

II. Application of Factors Used in Imposing Sanctions

Louisiana Supreme Court Rule XIX, Section 10(C) states that in imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

2. whether the lawyer acted intentionally, knowingly, or negligently;

3. the amount of actual or potential injury caused by the lawyer's misconduct; and

4. the existence of any aggravating or mitigating factors.

Here, the Respondent has violated duties owed to his clients, the public, the legal system and the profession. His conduct was knowing and intentional. In case number 99-DB-029, actual injury to the legal system and the public was present in that the Respondent misrepresented the true status of Dwayne Small's sentence to the court, and Mr. Small, a violent criminal, was released from prison years before his scheduled release date. In case number 00-DB-073, actual injury again is present. In several instances, the Respondent failed to provide accountings to his clients or to promptly return (or return at all) unearned fees, delayed his clients legal matters, and failed to promptly refund fees to his former client, Ms. Alston, as

instructed by the LSBA's Alternative Dispute Resolution Program.

The Board will adopt the aggravating factors found by the committees including prior discipline, substantial experience in the practice of law, and pattern of misconduct. The sole mitigating factor found by the committees was cooperative attitude toward the disciplinary proceedings. The Board finds that this mitigating factor is supported by the record and also will adopt it.

III. The Appropriate Sanction

Considering the misconduct present in both cases, disbarment is the appropriate sanction. Under Standard 6.11, "disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." Under Standard 4.61, "disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client." Standard 7.1 states that "disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and caused serious or potentially serious injury to a client, the public, or the legal system." In case number 99-DB-029, the respondent made a false statement and withheld material information to Judge Parker in connection with the Small matter. His misconduct in 00-DB-073 reveals a pattern of deception of

clients (i.e., promising favorable results which never materialize) and resulting fee disputes. Finally, his failure to honor his agreement to pay Ms. Alston the amount awarded to her in the LSBA Fee Dispute Program is a violation of his duty owed as a professional, which caused monetary injury to her.

Initially, the Board notes that case law indicates that, taken alone, the sanction for the Respondent's misrepresentation to the court carries a heavy sanction. In *In re Soileau*, 99-B-0441 (La. 6/18/99); 737 So.2d 23, formal charges were filed against the respondent, a former city court judge, based upon his criminal conviction for three misdemeanor hunting offenses of the Migratory Bird Treaty Act, failure to report his misconduct, and his misstatements of facts pertaining to his previous criminal record during his federal sentencing hearing. *Id.* at 25. The Court later determined that the respondent's misrepresentation to the federal magistrate judge was proven by clear and convincing evidence. A suspension from the practice of law for two years, with one year deferred, followed by a two-year period of probation was imposed by the Court. *Id.* at 27.

Likewise, in *LSBA v. Harrington*, 585 So.2d 514 (La. 1990), the Court imposed a nine month suspension for a lawyer's misconduct involving two instances of making false statements, one involving misleading opposing counsel and the court, two instances of unduly embarrassing, delaying or burdening a third person, and one instance of improper ex parte communication with a judge.

In *Soileau* and *Harrington*, the harm which resulted following the respondents' misrepresentations to the courts was not as serious as that seen in the matter at hand. Here,

a violent criminal, Dwayne Small, was released from prison years before his scheduled date of release because of the misrepresentations made by the Respondent to Judge Parker.

Cases which involve the other types of misconduct in which the Respondent engaged in this matter include *In re Brass*, 00-0180 (La. 2/18/00); 752 So.2d 161, *In re Welcker*, 99-3239 (La. 1/14/00); 753 So.2d 177, and *In re Cohen*, 00-1476 (La. 9/15/00); 769 So.2d 531. In *Brass*, the Office of Disciplinary Counsel filed formal charges consisting of two counts of unethical misconduct. The first count alleged that Brass failed to take any action after being retained to handle a criminal matter. The second count alleged that Brass represented to a client that, for the payment of $15,000, Brass could have criminal charges dismissed. Brass initially filed a response denying the misconduct, but later filed a consent discipline petition admitting to the misconduct. The consent discipline proposed that Brass be suspended from the practice of law for a period of one year. Ultimately, the Court rejected this petition. *Id.* at 161-63.

After dismissal of the consent discipline petition, ODC filed a second set of formal charges alleging that on three occasions Brass failed to pursue a legal matter and then misrepresented to the clients the actual disposition of the matter. Brass also failed to refund any unearned fees in these matters. Brass filed a second consent discipline petition admitting the misconduct in both sets of formal charges and proposing that he be disbarred from the practice of law. The Court agreed and disbarred Mr. Brass. *Id.* at 162-64.

In *Welcker*, two sets of formal charges were filed against the respondent alleging a total of eighteen counts misconduct, including lack of diligence, failure to communicate, failure to protect the property of a client or third person, failure to supervise the conduct of a non-lawyer, commission of criminal acts, engaging in conduct prejudicial to the administration of justice, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and failure to cooperate with ODC. *Id.* at 177-80. After formal charges were filed, Welcker filed a petition for consent discipline, admitting to most of the misconduct. The Court, after noting that Welcker had twice been disbarred for commingling and conversion of funds, extended the minimum period for readmission for an additional five years from the date of finality of this judgment. *Id.* at 180-81.

Finally, in *Cohen*, the Supreme Court held that disbarment was warranted for the respondent's misconduct which included numerous instances of neglect of client matters, failure to communicate with clients, failure to provide an accounting or return unearned fees and practicing law during periods of ineligibility. *Id.* at 531-34. The Court recognized that numerous aggravating factors were present, including prior discipline, pattern of misconduct, multiple offenses, obstruction of the disciplinary process, vulnerability of victims, lack of remorse, and indifference to making restitution. *Id.* at 535. The Court noted that the "sheer number of complaints against the respondent demonstrates in a convincing fashion that he has a complete lack of regard for the welfare of his clients and his professional obligations as a member of the bar of this state." *Id.*

Like the respondents in *Brass*, *Welcker* and *Cohen*, Mr. Pinkston has neglected his clients' legal matters, failed to communicate with his clients, and failed to render accountings or promptly return unearned fees. He has made false statements to the court, as did the respondents in *Soileau* and *Harrington*. His actions show his lack of regard for his clients and for his professional obligations as a member of the bar. The Board will adopt the recommendation of the hearing committee and recommend to the Court that the Respondent be disbarred. The Board will also recommend that the Respondent be ordered to make restitution to the aggrieved parties.

RECOMMENDATION

Based on the above, the Disciplinary Board adopts the report of the hearing committee in 99-DB-029 and modifies the report of the hearing committee in 00-DB-073 as noted above concerning the rule violations found in Counts I through III. The Board recommends that the Respondent, Donald O. Pinkston, be disbarred from the practice of law. The Board further recommends that the Respondent be ordered to make restitution to Mr. McDonald, Ms. Isaac, Ms. Motton and Ms. Nunnery and that he provide proof of previous restitution to made to Ms. Alston ($3,000) and Mr. McDonald ($1,750) upon submitting his application for readmission. The Board further recommends that the Respondent be assessed with all costs and expenses of these proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD
JUDY Y. BARRASSO
JOHN G. BECKWITH, SR.
REGINALD BROWN, SR.
WANDA A. DAVIS
DAVID R. FROHN
JAMES L. PATE
JACK O. WHITEHEAD, JR.

BY: _____
ROBERT E. LEAKE, JR.
FOR THE ADJUDICATIVE COMMITTEE

PETER T. DAZZIO – Not Participating.

APPENDIX B

PINKSTON, DONALD O.
99-DB-029 (05/09/01)

RECOMMENDATION OF HEARING COMMITTEE
IN RE: DONALD O. PINKSTON
NO. 99-DB-029

REPORT OF HEARING COMMITTEE #24

I. PROCEDURAL HISTORY

Formal charges were filed on April 21, 1999. Respondent filed an answer to the charges on June 2, 1999, and the matter was assigned to Disciplinary Committee No. #24. Pre-hearing memoranda were filed by Disciplinary Counsel on December 4, 2000, and by Respondent on December 11, 2000.

A hearing was held on December 14, 2000. Present were Herbert V. Larson, Jr., representing Respondent, and Charles B. Plattsmier, Chief Disciplinary Counsel. Mr. Larson waived the appearance of Respondent. The parties stipulated to the admissibility of ODC Exhibits 1 through 27, and respondent's Exhibit 1, and these were admitted. During the course of the hearing, ODC Exhibits 28 and 29 were admitted without objection.

At the conclusion of the hearing the matter was held open for (1) the receipt of the transcripts of the depositions of Judge Sharon Hunter, which was received on January 14, 2001 and (2) post-hearing memoranda which were filed by Disciplinary Counsel on January 24, 2001, and by Respondent on April 6, 2001.

A. BRIEF FACTUAL SETTING

Dwayne Small was a defendant in Orleans Parish Criminal District Court, charged with the commission of a homicide. It was on the docket of Judge Jerome Winsberg, Section "C". As part of a plea bargain, the District Attorney's Office reduced the charge to manslaughter in exchange for a guilty plea and a sentence of 21 years. Small was represented by Ernest Caulfield. The plea was accepted, a 21-year sentence was imposed by Judge Winsberg, and Small began serving his sentence in or about 1992.

Dwayne Small is the stepson of the Respondent. In 1995, Respondent enrolled as counsel of record for Mr. Small and filed, on Small's behalf, a "Motion to Correct Excessive Sentence," which was scheduled for hearing in February of 1996. Before the motion was heard, Judge Winsberg retired, effective January 1996, and the Louisiana Supreme Court appointed Ike Spears to sit as Judge Pro Tempore in Section "C" pending a new election.

At the February 1996 hearing, Respondent argued that the "Sentencing Guidelines Grid" required a shorter sentence for Small's crime. Judge Spears reset the matter for March 1996, and in the interim the District Attorney's office filed a memorandum in opposition to the Motion to Reduce Excessive Sentence. In his testimony before the Committee, Judge Spears acknowledged that he did not believe the Respondent's arguments for a sentence reduction had sufficient merit to withstand appellate review, but he was willing to entertain the motion because Respondent assured him that the District Attorney, Harry Connick, or someone within Mr. Connick's office, had agreed not to oppose the motion. The Assistant District

Attorney assigned to the case, Maurice Landrieu, who also testified before the Committee, could not confirm such an agreement. Judge Spears postponed the hearing of the motion several times to afford Respondent an opportunity to confirm the purported agreement not to oppose the motion, but Respondent was unable to do so.

On June 25, 1996, Judge Spears ruled on the motion and reduced Dwayne Small's sentence from 21 years to 12 years, but stayed the effect of the order to enable the State to file writs. On July 2, 1996, Mr. Landrieu filed a motion seeking reconsideration of the sentence reduction. Judge Spears kept the stay in place and again continued hearings of the State's motion to permit Respondent an opportunity to confirm his purported agreement with the District Attorney's office. Finally, On October 4, 1996, with Respondent present, Judge Spears granted the State's motion to reconsider and reinstated Dwayne Small's original 21 year sentence. At the request of Respondent, Judge Spears scheduled a status conference on the matter for November 1996.

Before that status conference, Sharon Hunter was elected to fill the vacancy in Section "C", and the matter passed to her. On November 15, 1996, she held a status conference, and the docket reflects that, "the status hearing considered held and satisfied," which in her deposition testimony the Judge said meant "nothing else was to be had." (Hunter Deposition, page 10). Small remained in prison.

For unexplained reasons, Dwayne Small's case appeared on the docket of Judge Julian Parker, Section "G", on March 21, 1997. On that day Respondent represented to the Court that, "I have had an opportunity to discuss

this matter with the Assistant District Attorney and pursuant to the conference that we held, I understand that a corrected minute entry needs to be sent to the Department of Corrections in this matter. We request the court to order a corrected minute entry be entered." (ODC Exhibit 8). Respondent represented to the court that Judge Spears had imposed a 12 year sentence on Dwayne Small, but that an error had been made and that the actual sentence should have been 9 years. Judge Parker reduced Small's sentence to 9 years. Small was released from prison.

Citizens in the community learned of Small's release and raised their concerns with the District Attorney's office. Maurice Landrieu asked Judge Parker to convene a hearing to review the circumstances of the release. A hearing was held on October 8, 1997, and Judge Parker asked Respondent how and why the case was transferred to his Court from Section "C". Respondent replied, "It was remanded to Section G by Judge Hunter. She recused herself." (ODC Exhibit 11). In a subsequent hearing on the same subject, how the matter got into Section "G", Respondent answered, "Your Honor, I have no idea. I have no connections with this building. I have no connections with Judge Hunter. I have no connections with the court. All I know is that the case was on the docket, I received a subpoena, I showed up." (ODC Exhibit 13). In a subsequent hearing before Judge Parker on this same issue, Mr. Landrieu informed the court that Judge Spears had reversed his reduction of the sentence and restored the original sentence of 21 years. Mr. Pinkston responded, "That's not true." (ODC Exhibit 19).

Judge Parker revoked his reduction of Small's sentence, and Respondent applied for writs to the Fourth Circuit Court of Appeal. That court requested a Per

Curiam from Judge Parker explaining the situation, and in that statement the Judge declared that his court had been "misled" by Respondent as to what sentence Judge Spears had actually imposed on Small, and by Respondent's representation that Judge Hunter had recused herself. (ODC Exhibit 21). In her deposition, Judge Hunter testified that she had not recused herself from the Dwayne Small case.

Each of the Assistant District Attorneys present in Judge Parker's court on the day that Respondent first brought the Dwayne Small matter before the Judge state that Respondent held no conference with them on the matter.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct 1.2(c), 3.3(a)(1), 3.3(a)(2), 3.3(a)(4), 8.4(c) and 8.4(a).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in the preceding Section A are correct, and in addition specifically finds that:

1) Judge Ike Spears, sitting Pro tempore in Section "C", reversed his earlier reduction of the sentence of Dwayne Small and, on October 4, 1996, reinstated Mr. Small's original 21-year sentence.

2) Judge Sharon Hunter, Judge in Section "C", did not recuse herself from consideration of the Dwayne Small's case. The matter was marked closed on the docket

of Section "C". Judge Hunter did not allot the case to Section "G".

3) Respondent misrepresented to Judge Parker (a) that Judge Sharon Hunter had recused herself when she had not, (b) that Judge Spears had reduced Dwayne Small's sentence to 12 years when in fact the Court had reinstated the original 21 year sentence, and (c) that the minute entry by Judge Spears was erroneous and should be corrected to further reduce Dwayne Small's sentence to 9 years when there is no indication that Judge Spears ever intended to reduce Small's sentence to 9 years (and Mr. Spears testified that he never reduced the sentence to 9 years. Hearing Transcript, pages 86-91).

4) As a result of the misrepresentations by Respondent to the Court, Judge Parker signed a "corrected" minute entry that resulted in the temporary release of Dwayne Small from prison.

5) The testimony of Maurice Landrieu, Ike Spears, Judge Sharon K. Hunter, and Judge Julian Parker is credible with respect to the foregoing.

6) While no direct evidence establishes how the Dwayne Small case was moved onto Judge Parker's docket, both Judge Parker and Judge Hunter stated that they did not request or consent to the transfer. (ODC Exhibit 21; Hunter Deposition, page 13). If Respondent did not improperly cause the transfer, he nevertheless took advantage of it.

7) There was conflicting testimony as to whether an assistant district attorney was present when Judge Parker, on March 21, 1997, ordered Small's sentence

reduced, but this issue was not material to the Committee's findings or recommendations.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rules of Professional Conduct 3.3(a)(1), 3.3(a)(2), 3.3(a)(4), 8.4(a), 8.4(c), and 8.4(d).

II. BASELINE SANCTION

The baseline discipline is disbarment (Standards, Rule 6.11 and 7.1). Additionally, in the Pre-Hearing Memorandum Submitted on Behalf of Respondent Donald O. Pinkston, it is stipulated that: "The appropriate sanction for the charges brought by the Office of Disciplinary Counsel is disbarment, if the charges are proven by clear and convincing evidence. See In Re: Ronald A. Welker, 753 So.2d 177 (La. 2000)".

III. AGGRAVATING AND MITIGATING FACTORS

The primary aggravating factors are Respondent's prior discipline (a two-year suspension) and his substantial experience in the practice of law. The Committee finds, in mitigation, that Respondent has cooperated with the Office of Disciplinary Counsel and with the Disciplinary Board in these proceedings. Both Mr. Larson and Mr. Plattsmier conducted themselves in a highly professional manner.

IV. RECOMMENDATION

It is the Committee's recommendation that Respondent be disbarred and that he be assessed all costs of these proceedings.

New Orleans, Louisiana, this 8th day of May, 2001.

HEARING COMMITTEE #24
ANTHONY P. DUNBAR, Chair
JOAN M. VOGEL
RICHARD P. LEMMLER, JR.

APPENDIX C

PINKSTON, DONALD O.
00-DB-073 (03/08/01)

RECOMMENDATION OF HEARING COMMITTEE
IN RE: DONALD O. PINKSTON
NO. 00-DB-073

REPORT OF HEARING COMMITTEE #24

I. PROCEDURAL HISTORY

Formal charges were filed on June 12, 2000. Respondent filed an answer to the charges on July 5, 2000, and the matter was assigned to Disciplinary Committee No. #24. Pre-hearing memoranda were filed by Disciplinary Counsel on September 6, 2000, and by Respondent on September 14, 2000.

A hearing was held on September 14, 2000. Present were Respondent and his counsel, Herbert V. Larson, Jr., and Mimi T. Nguyen, Deputy Disciplinary Counsel. The parties stipulated to the admissibility of ODC Exhibits 1 through 40, and these were admitted. During the course of the hearing, Respondent's exhibits, marked D-1 though D-8, and ODC Exhibits 41 through 44, were admitted without objection. ODC Exhibit 45 was ruled inadmissible, and it was proffered by Deputy Disciplinary Counsel.

At the conclusion of the hearing the matter was held open for (1) the receipt of the transcripts of the depositions of Charles Martin, Kevin McDonald, David Singleton, and Robert Evans, which were received on October 17, 2000, (2) certain documents that Respondent said during the course of the hearing he wished to submit, which were

received on October 17 and 18, 2000, and (3) post-hearing memoranda which were filed by Disciplinary Counsel on November 30, 2000, and by Respondent on December 1, 2000.

COUNT ONE:

KENNETH McDONALD

A. BRIEF FACTUAL SETTING

Mr. McDonald, represented by Frank DeSalvo in a Federal criminal matter, paid Respondent $3,500.00 for representation. There was no written contract between them. Respondent maintained that the gist of his employment was to attempt to negotiate a favorable plea arrangement or sentence; Mr. McDonald maintained that Respondent was retained to arrange an expeditious bond hearing, obtain a favorable sentence, and, if no plea agreement were reached, to handle McDonald's appeal. Respondent met with McDonald several times in jail and testified that he spoke several times with an Assistant U.S. Attorney. Mr. McDonald did not get a bond hearing, a sentence he deemed favorable, or get help with his appeal. Respondent has not rendered an accounting for his services; he maintains he was retained on a "flat fee" basis. Mr. McDonald demanded a refund of unearned fees, but Respondent failed to deliver a refund or place any portion of the fee in trust.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.3*, *1.4*, *1.5*(f)(6), *1.15*, *1.16*(d), and *8.4*.

C. FACTUAL AND EVIDENTIARY FINDINGS

Without a written engagement, it is difficult to determine what Respondent was engaged to do, but the committee finds credible Mr. McDonald's deposition testimony that he retained respondent to use his influence with the U.S. Attorney to get a bond hearing set and, failing that, to work out a favorable sentence, and, failing that, to handle the matter on appeal. (Deposition, pages 5-7). We find that Respondent spent some time on this case, though the exact amount cannot be determined from the testimony, the evidence, or Respondent's records, and that he was unsuccessful in obtaining any results for Mr. McDonald. Based upon the testimony of Respondent and Mr. McDonald, we conclude that, while Respondent may not have explicitly promised a specific result, Mr. McDonald reasonably believed that, for $3,500.00, Respondent would successfully obtain a bond hearing or favorable sentencing, and that Respondent failed to do so.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rule *1.5*(f)(6).

COUNT TWO:

AMMIE ISAAC/EMMANUEL ISAAC

A. BRIEF FACTUAL SETTING

Mr. Isaac's mother retained Respondent to represent her son, post-conviction, in State court at his sentencing hearing and to handle his appeal. There was no written contract between them. She claims to have paid Respondent $5,000.00, and he states he received $3,000.00. Respondent filed and argued a motion for a new trial and appeared at the sentencing hearing, but thereafter failed

to communicate consistently with Ms. Isaac or her son. Over the next year and a half, Respondent was granted numerous extensions of time by the Court of Appeal to produce a trial transcript and to file his appeal brief, but he failed to file the brief until shortly after the disciplinary complaint was filed. A month later, Respondent was suspended from the practice of law on other charges, and Ms. Isaac hired a new attorney to take over the appeal. Respondent has not rendered an accounting for his services; he maintains he was retained on a "flat fee" basis. Ms. Isaac demanded a refund of unearned fees, but Respondent failed to deliver a refund or place any portion of the fee in trust.

B. RULES ALLEGEDLY VIOLATED

Respondent's conduct allegedly violated Rules of Professional Conduct *1.3* and *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

Based upon the receipts introduced into evidence, the Committee finds that Respondent was paid $3,000.00 to represent Mr. Isaac. We find that Respondent was retained in or about March of 1997. We find that the record was lodged with the Court of Appeal on January 28, 1998 and that respondent's brief was filed in November 1998 (ODC Exhibit #11). We find that Respondent failed diligently to pursue Mr. Isaac's appeal and failed to communicate adequately with his client or Ms. Isaac about the status of the case. We find that he appeared in court on Mr. Isaac's behalf on at least two occasions, and that he did ultimately file an appeal brief on his client's behalf.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rule *1.3* and, though he was not formally charged with the following, Rules *1.4* and *1.5*(f)(6).

COUNT THREE:

DAVID SINGLETON

A. BRIEF FACTUAL SETTING

The son of Mr. Singleton paid Respondent $1,500.00 to attempt to secure a sentence reduction on behalf of his father, who had been incarcerated for 25 years. There was no written contract between them. Mr. Singleton testified in his deposition that Respondent did not guarantee success. (Deposition, page 7). Respondent accepted seven or eight collect calls from Mr. Singleton over the following two years and obtained copies of Mr. Singleton's medical records in order to make a case for a sentence reduction of a transfer for his client. (A copy of those records is included in Respondent's post-hearing submission). Respondent testified that he spoke on one occasion to the trial judge about the matter, and spoke with Mr. Singleton's wife on several occasions. Mr. Singleton has demanded a partial refund of the fees paid to Respondent.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.3*, *1.4*, and *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

The Committee finds no clear and convincing evidence that Respondent violated any ethical rule.

COUNT FOUR:

FELISIA N. ALSTON

A. BRIEF FACTUAL SETTING

There is no dispute that respondent agreed to participate in the Louisiana State Bar Association Alternative Dispute Resolution Program and was ordered to pay $3,000.00 to a former client. Respondent testified that he has paid $1,000.00 of this amount, and there is no evidence to the contrary. Respondent has failed to pay the rest of the amount due.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct 8.1(a), 8.4(a)(c)and (d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rules *8.4*(a) and (d).

COUNT FIVE:

CHARLES MARTIN

A. BRIEF FACTUAL SETTING

Mr. Martin, charged in Mississippi with murder, asked Respondent to represent him in the matter. Respondent

contacted Robert Evans, a part-time public defender in Jefferson County, Mississippi, who had been appointed to defend Mr. Martin, and made arrangements for Respondent to enroll as co-counsel. Advised by Evans of the rules for appearing Pro Hac Vice in Mississippi, Respondent testified that he took the steps necessary to file the required documents with the Mississippi Circuit Court. Respondent did appear in Mississippi court on two occasions, but Mr. Evans, and not Respondent, attended the hearing at which Mr. Martin entered a guilty plea. Mr. Martin subsequently filed complaints with both the Louisiana and Mississippi Bar Associations, alleging that Respondent was not authorized to practice law in Mississippi. The Mississippi Bar Association, hearing these same charges, found "no conduct of said attorney which would warrant any action under the disciplinary rules governing lawyers practicing in this state." (ODC Exhibit #19).

B. RULES ALLEGEDLY VIOLATED

Respondent's conduct allegedly violated Rule of Professional Conduct *5.5* (In addition, a violation of Rule *8.1*(a) is alleged in Disciplinary Counsel's Post-Hearing Memorandum.)

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

The Committee finds no clear and convincing evidence that Respondent violated any ethical rule.

COUNT SIX:

HILDA JONES

A. BRIEF FACTUAL SETTING

Mrs. Jones retained Respondent to handle a criminal matter for her son and paid Respondent $1,000.00 on February 16, 1999. She also paid $1,200.00 to Melvin Winins the same day. (ODC Exhibit #36). Respondent says, "Mr. Winins is an investigator I have frequently used in the past." (ODC Exhibit #38). Respondent denied he received any portion of the $1,200.00 paid to Mr. Winins. Ms. Jones apparently understood that Winins was not a lawyer, but her confusion on this issue is obvious. (ODC Exhibit #40). On the day he received his check, or the next day, Respondent learned that his petition for a rehearing in the Louisiana Supreme Court had been denied, and that he was suspended from the practice of law. Respondent did not immediately return the $1,000.00 to Ms. Jones, though he testified that at his request another lawyer did go to court on the son's behalf. In August of 1999, after he was notified that Ms. Jones had filed a disciplinary complaint, Respondent refunded $1,000.00 to Ms. Jones.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rule *1.16*(d).

COUNT SEVEN:

AGNES MOTTON and ZINA NUNNERY

A. BRIEF FACTUAL SETTING

Frank Motton was sentenced to a lengthy sentence in 1979 and filed an application for post-conviction relief. Ms. Motton and Ms. Nunnery retained Respondent in 1995 to represent Mr. Motton in his attempt to obtain a hearing on his application and paid him $2,300.00. Receipts were issued to Zina Nunnery for $700.00 and to Agnes Motton for $1,600.00. (ODC Exhibit #27). Over the next three years Respondent filed three writs of habeas corpus to have Mr. Motton brought to the district court for a hearing on Motton's application, but each time the matter was continued. When Respondent was suspended from practice, another attorney took over the case in 1999. Respondent admits that he did not earn the entirety of his fee. (See Respondent's Post-Hearing Memorandum, page 7). The complaint alleged, among other things, that Respondent failed to keep his clients informed about the status of their case, and there is no credible evidence that Respondent did communicate fully with his clients.

B. RULES ALLEGEDLY VIOLATED

Respondents conduct allegedly violated Rules of Professional Conduct *1.3*, *1.4*, *1.5*(f)(6), and *1.16*(d).

C. FACTUAL AND EVIDENTIARY FINDINGS

The Committee finds that the facts set forth in Section I above are correct, and further that Respondent did not

obtain for his clients the result they reasonably believed he had undertaken to obtain.

D. DETERMINATION OF RULES VIOLATED

Respondent's conduct violated Rules *1.3* and *1.5*(f)(6).

II. BASELINE SANCTION

As set forth above with respect to the individual counts, the Committee has found violations of Rules of Professional Conduct *1.3*, *1.4*, *1.5*(f)(6), *1.16*(d), and *8.4*(a) and (d). The baseline discipline is suspension when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client (Standards 4.12) and when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client or engages in a pattern of neglect and causes injury or potential injury to a client (Standards 4.42).

III. AGGRAVATING AND MITIGATING FACTORS

The primary aggravating factors are Respondent's prior discipline and the pattern of misconduct reflected in the matters at hand. While the misconduct alleged in the foregoing complaints occurred before Respondent's two-year suspension became effective, the judgment of the Supreme Court of Louisiana in that matter (involving charges of failure to maintain client funds in trust) noted that Respondent had even then been the subject of prior discipline. The Court noted that: "In January 1997, respondent was reprimanded by the disciplinary board for misleading clients, failing to return an unearned fee, and commingling funds. . . . Respondent was also admonished four times between 1994-1995 for failure to cooperate by not filing written answers to complaints." (ODC Exhibit

#44, FN4). Thus, the Committee finds that the misconduct found in the complaints now before the Committee do arise from actions in disregard of prior discipline.

The Committee finds, in mitigation, that Respondent has cooperated with the Office of Disciplinary Counsel and with the Disciplinary Board in these proceedings.

IV. RESTITUTION

With respect to the complaint of Kenneth McDonald (Count One), the Committee finds that Mr. McDonald is due restitution in the amount of $3,500.00, the entire fee paid to Respondent.

With respect to the complaint of Ammie Isaac (Count Two), the Committee finds that Ms. Isaac is due restitution in the amount of $3,000.00, the entire fee paid to Respondent.

With respect to Count Four, Respondent admits he has failed to make restitution to a former client, as set by the arbitrator, in the amount of $2,000.00, and he should be required to do so.

With respect to the complaint of Agnes Motton and Zina Nunnery (Count Seven), the Committee finds that Agnes Motton is due restitution in the amount of $1,600.00, the entire fee she paid to Respondent, and that Zina Nunnery is due restitution in the amount of $700.00, the entire fee she paid to Respondent.

V. RECOMMENDATION

It is the Committee's recommendation that Respondent be suspended from the practice of law for thirty (30)

months and be required to file a petition for reinstatement. In addition this Committee recommends that prior to his reinstatement Respondent be required to pay restitution to Kenneth McDonald in the amount of $3,500.00, to Ammie Isaac in the amount of $3,000.00, to Felisia N. Alston in the amount of $2,000.00, to Agnes Motton in the amount of $1,600.00, and to Zina Nunnery in the amount of $700.00. Further, the Committee recommends that Respondent be assessed the costs of these disciplinary proceedings pursuant to Rule *XIX*(10)(A)(7).

New Orleans, Louisiana, this 7th day of March, 2001.

HEARING COMMITTEE #24

ANTHONY P. DUNBAR, Chair
JOAN M. VOGEL
RICHARD P. LEMMLER, JR.